

Chapter 4

LEVERAGING ALL AVAILABLE CLEANUP RESOURCES

Introduction

The recommendations in this chapter address the use of Superfund enforcement and other available cleanup resources to maximize the amount of cleanups and ensure that limited Trust Fund resources are available for orphan sites or those with recalcitrant PRPs. The Study suggests areas where more effective enforcement, particularly in earlier stages of the Superfund cleanup process, as well as State and other authorities would make more resources available for cleanup at orphan sites.

The recommendations under Leveraging All Available Cleanup Resources fall into three subcategories: (1) PRP-lead Cleanups; (2) State-lead Cleanups; and (3) Other Cleanup Authorities.

4.1 PRP-LEAD CLEANUPS

Background:

The long-term success and financial viability of the Superfund Program depends in a large part on a robust enforcement program. Every dollar spent on Superfund's civil enforcement program returns approximately \$8 to the Program.

In recent years, the Regions have placed more focus on enforcement, particularly following the inception of the "enforcement first" initiative. Over the life of the Program, responsible parties have funded more than \$18.1 billion in response actions at NPL sites. The Program has also secured commitments for an additional \$3.9 billion in cost recovery settlements. Site-specific special accounts have generated \$177 million in interest from the \$1.1 billion collected.

While these results are impressive, improvements in management and performance measurement would increase the enforcement program's effectiveness, particularly for RI/FSs and removals. Over the past three years, PRPs have conducted 70 to 80 percent of the remedial actions while performing less than half of the RI/FSs and only 20 percent of removals (this increases to 41 percent when including those removals without orders). Performance has been highly variable, however: some Regions have a very high historical performance with more than 60 percent of their RI/FSs conducted by PRPs, while others had more than 60 percent of removals conducted by PRPs. Obtaining similar success, if possible, in other Regions through the sharing of "best practices" could free up additional funds that could be made available for remedial actions at sites with no liable/viable PRPs—so-called "orphan sites."

Recommendations and Actions:

Recommendations 4 and 23: Maintain Sufficient Site Listing. OSWER and the Regions should work together to maintain a sufficient rate of listing on the NPL to provide clear incentive for PRPs to perform work under the Superfund Program as well as other Programs or authorities (Rec. 4). OSWER should maintain a sufficient rate of listing on the NPL to function as an incentive for PRPs to perform work under the Superfund Program as well as other Programs and authorities (Rec. 23).

Action: OSRTI sent a memo to the Regions dated December 1, 2004, announcing that OSWER will return to a regular schedule for proposing and finalizing sites on the NPL. This will be done twice a year (April and September). *(Complete)*

Recommendations 5: Start Fund-Lead Actions. OSWER should allocate resources to start Fund-lead actions at every step in the Superfund pipeline, thereby motivating PRPs to commit to taking on work and freeing up appropriated dollars over the long term.

Action: No additional action is required pursuant to this recommendation as this is a current activity. *(OSRTI)*

Key - Recommendation 24: Maximizing PRP Involvement. While continuing to stress early PRP search activity and maximizing PRP involvement, OSWER should continue to target funds to begin RI/FS work where PRP recalcitrance is evident.

Action: On July 1, 2004, OSRTI and OSRE distributed draft guidance for comment on “Early Enforcement at Superfund Sites: Negotiation and Enforcement Strategies for Remedial Investigation/Feasibility Studies (RI/FS).” This guidance will go final in the second quarter of FY 2005. *(OSRTI)*

Key - Recommendation 53: Conduct Effective Early PRP Searches. Conduct responsible party search benchmarking to identify strong Regional programs to increase the percentage of PRP response actions at all phases of the Superfund pipeline and take further pressure off appropriated funds.

Action: OSRE will conduct a Program evaluation of Regional PRP search efforts to determine the relationship between enforcement success and PRP search expenditures and practices. Additional follow-up actions will be identified based on the outcome of this evaluation. As a component of the Program evaluation, OSRE will evaluate Regional trends, PRP search “best practices,” and barriers to identifying PRPs early and getting them to perform RI/FSs. *(OSRE)*

Key - Recommendation 54: Increase Removal Enforcement. OECA and OSWER should work with the lead Regions to develop goals similar to those in the Remedial Program for enforcement first in the Removal Program to increase the percentage of PRP-conducted removal actions.

Action: OSRE proposes to conduct a Program evaluation of Regional removal enforcement efforts to determine the relationship between enforcement success and removal enforcement practices. Additional follow-up actions will be identified based on the outcome of this evaluation. *(OECA)*

Recommendation 55: Establish Contact for Enforcement First for the Removal Program. OSWER should identify a management liaison who can work with OECA to facilitate and support enforcement first for the Removal Program.

Action: The Director of the Program Operations and Coordination Division is the key point of contact in the OEM on issues related to Removal Program enforcement. A point of contact has been identified. This action is complete. *(OEM)*

Recommendation 56: Enhance Insurance-Related Cost Recovery Expertise. OECA, in consultation with DOJ, should explore ways to access or gain greater expertise in the area of insurance-related cost recovery, and sponsor several pilot programs across the country to increase potential sources of funding for orphan sites.

Action: Several actions will be taken to address this recommendation. They include: developing and implementing a pilot contract to assist Regions on enforcement cases involving insurance issues; developing a memo to the Regions explaining the process for accessing contractor support for evaluating insurance issues; providing support to the Regions in preparing case materials; and developing a lessons learned report. *(OECA)*

Key - Recommendation 58: Ensure Efficient PRP Oversight. Develop procedures that encourage continued collaboration with PRPs in site cleanups in order to decrease the need for EPA's expenditure of oversight resources.

Action: In the fourth quarter of FY 2004, comments were received from the Regions on a draft memo which recommended that Superfund managers employ the guidelines provided in the RCRA "Results-Based Approaches and Tailored Oversight Guidance," when considering how and when to apply appropriate levels of oversight at Superfund sites. OSRE is currently evaluating the input and expects to issue guidance in 2005. OSRE also has drafted guidance on Prepayment of Oversight from Special Accounts. *(OECA)*

4.2 STATE-LEAD CLEANUPS

Background:

The States have played a vital role in Superfund since the Program's inception, and that role has changed and fluctuated over time. They have played a major part in setting cleanup standards for Superfund sites, and have taken the lead on community relations at many sites. States have influenced the listing and non-listing of NPL sites, and have put forth additional State funds, beyond their 10 percent share, to clean up sites.

States want varying degrees of independence in implementing the Superfund Program. Many States now have their own Superfund or hazardous waste programs, and EPA established a grant program to help build State Superfund capacity. However, even with this funding, States vary tremendously in their capacity to clean up and manage waste sites. Some are national leaders while others, often due to budget decisions and programmatic choices, have little or no response capability. Likewise, EPA has seen varying degrees of success when States are in the lead role for NPL remedial activities.

EPA should re-examine its NPL State-lead sites to determine if these are the most cost-effective mechanism for site remediation. Most likely, it will vary tremendously State by State. The use of State-lead in NPL site remediation should be based solely on good business decisions, such as cost effectiveness, timeliness, previous performance, etc. This review of State-lead NPL responses should in no way impact the ongoing role the States and EPA enjoy in voluntary cleanups, the Brownfields Program, and non-NPL sites, as well as the traditional role states play in all NPL sites (e.g., ARARs, community relations).

Recommendations and Actions:

Recommendation 45: Review EPA Policies on State-lead Cleanups and the Adequacy of these Actions. OSWER, OECA, and the Regions should re-examine existing policies relating to State-lead clean up. In the process an evaluation should be conducted to determine if the policy includes areas such as capability, past experience, cost and timeliness. EPA should consider if the State role should be determined using similar criteria as that used for choosing a remediation contractor or other federal agencies. In addition, the Regions should re-examine existing State lead sites to determine if the remediation is being conducted in a timely and cost efficient manner.

Action: Regions currently conduct annual reviews of individual State programs using the Superfund Comprehensive Accomplishment Plan (SCAP)/Superfund Program Implementation Manual (SPIM) process. Many conduct quarterly meetings on site cleanups. Some Regions have work-sharing procedures that direct incoming sites into federal- or State-lead, or into Superfund or other federal or State programs. Currently, Regional decisions consider state capability, past experience, cost, and timeliness.
(OSRTI)

Recommendation 46: Re-examine State-lead Sites. OSWER, OECA and the Regions should re-examine State lead sites to determine if the remediation is being conducted in a timely and cost efficient manner.

Action: No additional action will be taken against this recommendation as this is ongoing. Annually EPA Regions meet with the States to review State- and federal-lead sites, and evaluate progress, expenditures, and budgets for the coming year. The Regions already review RODs prior to finalizing, and State-lead sites are still subject to the Remedy Review Board. The Program believes that this constitutes an evaluation to determine if remediation is conducted in a timely and cost effective manner. *(OSRTI)*

Recommendation 48: Determine State Core Funding Needs. OSWER should evaluate the need, the overall funding levels, and the priorities for State cleanup programs given the Section 308 program and the original goal of the Core program to build State capacity. Working with ATSWMO and collaborating with individual States, the Agency should communicate the goal and results of the evaluation.

Action: No additional action will be taken against this recommendation as the work is ongoing. EPA provides to the Regions and the States a breakout of all Cooperative Agreement Funds sent to the States along with a summary of what has and has not been spent. These unliquidated balances are shared with ATSWMO and others to ensure that Superfund Cooperative Agreement monies allocated to States are spent appropriately and that unfunded actions are deobligated. The Brownfields Program also tracks closely 128 grant funds to States. This is a regular, ongoing task that will continue in the future. *(OSRTI)*

4.3 OTHER CLEANUP AUTHORITIES

Background:

The prevention of a continually expanding Superfund site universe will depend largely upon a strong RCRA program. Some sites on the NPL are a direct result of insufficient financial assurances to fund the cleanup necessary when the facility at that location ceased operation. Similarly, removal actions occur at RCRA generation sites, for which financial assurances are not required. The Agency eventually lists some of these sites on the NPL.

A number of interviewees think that certain decisions made in the RCRA program may result in the need for additional future cleanups under Superfund. For example, there is a fairly broadly held belief that EPA could substantially reduce future Superfund workload if it revamped

regulations and policies that enable the start-up and continuation of operations that handle hazardous wastes, but whose financial and/or technical wherewithal to prevent or respond to releases is questionable.

During the more than 20 years of the Superfund Program's existence, more than 7,000 removal actions have been conducted. There now should be sufficient data to perform an historical analysis of these actions to determine if any patterns are apparent. For example, are particular types of industry or businesses are more likely to require a removal action (or have sites listed on the NPL)? If certain categories repeatedly require removal actions, the Agency should evaluate what, if any, changes should be made to the applicable regulations, policies, or guidance.

Recommendations and Actions:

Key - Recommendation 10: Evaluate NPL Listing Trends for RCRA Treatment, Storage and Disposal Facilities (TSDFs). OSWER should evaluate the history of NPL listings and removal actions to determine what percent were RCRA TSDFs or hazardous waste generators and to what extent these facilities present a continuing burden to the Superfund program.

Action: The Office of Solid Waste (OSW), OSRE, and OSRTI will work together to analyze sites addressed by Superfund. The analysis will specifically evaluate RCRA TSDF facilities before and after financial assurance regulations were implemented, RCRA generators, and other sites addressed by Superfund. This analysis will help assess whether RCRA's financial assurance provisions have been effective, and whether a similar analysis should be conducted for other categories of RCRA (and other) sites. *(OSRTI)*

Key - Recommendation 11: Determine Adequacy of RCRA Financial Assurance. If the evaluation confirms a high correlation with RCRA-regulated facilities, OSWER and OECA should examine different approaches to financial assurance under the RCRA program to reduce the likelihood of RCRA-regulated facilities becoming part of the future Superfund universe.

Action: Work on this action will be impacted by two other efforts: the study undertaken pursuant to Recommendation 10, and the work of the Environmental Financial Advisory Board (EFAB), which has been charged with reviewing related financial assurance issues. Action on Recommendation 11 will await the preliminary analysis for Recommendation 10, and will include coordination with the EFAB schedule (not yet developed). Pursuant to Recommendation 11, OSWER will conduct an analysis and produce a report with recommendations, if any, for enhancing the financial assurance requirements under RCRA to prevent future burdens on the Superfund Program. EPA would consider EFAB's work as part of its ongoing analysis and recommendations, as well as OECA's work in assessing whether financial assurance will be a national enforcement priority in FY 2006/2007. In addition, OECA is currently evaluating whether to include Financial Assurance as a national program priority for FY 06. The

Priority is likely to focus on compliance with CERCLA and RCRA financial assurance requirements. *(OSW/OSRTI)*

Key - Recommendation 12: Evaluate Financial Assurance for non-RCRA Facilities. For facilities not covered under RCRA, OSWER should study whether promulgating new regulations under the Comprehensive Environmental Response, Compensation and Liability Act's (CERCLA) broad financial assurance authorities could reduce the future needs of the Superfund program.

Action: OSWER (OSRTI and OSW) will review the NPL listings and removal actions at non-RCRA facilities to determine if risks and costs associated with facilities impacting the Superfund program make promulgation of financial assurance requirements under CERCLA 108(b) advisable.

- *First*, OSWER will evaluate those types of facilities that have a significant impact on the Superfund program in an effort to identify those classes of facilities for which financial assurance would be most appropriate given the statutory criteria.
- *Second*, OSWER will assess the information for cleanup actions for the classes of facilities being identified as being the most significant in terms of assessment, removal, and remedial actions. This information will form the basis for recommendations for next steps in terms of promulgating regulations under CERCLA 108(b). EPA would consider EFAB's work on financial assurance as part of its ongoing analysis and recommendations, as well as OECA's work in assessing whether financial assurance will be a national enforcement priority in FY 2006/2007. In addition, OECA is currently evaluating whether to include Financial Assurance as a national program priority for FY 06. The Priority is likely to focus on compliance with CERCLA and RCRA financial assurance requirements. A decision will probably be made at a meeting of the OECA Planning Council in January 2005. *(OSRTI and OECA)*

Key - Recommendation 36: Evaluate Removal and NPL Listing Trends by Industry Sector. OSWER should conduct an evaluation of historical removal actions to determine whether patterns exist in certain industries (Standard Industrial Classification codes). If the evaluation reveals that certain industries repeatedly end up on the NPL, the effort could go on to identify available or needed mechanisms by all authorities to address recurring issues.

Action: OEM will conduct data analysis of CERCLIS removal action data, including whether data quality will support a thorough analysis; break out removal action CERCLIS data by industry groups; and identify clear trends related to specific industries. *(OEM)*